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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL MCGINNIS and CYNDY BOULTON, individually, and on behalf of all others similarly situated,

Plaintiffs,
v.
COMMUNITY.COM, INC.,
Defendant

Case No. 2:23-cv-02426-SB-JPR

**DEFENDANT COMMUNITY.COM,
INC.'S NOTICE OF MOTION AND
MOTION TO DISMISS;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: August 11, 2023
Time: 8:30 a.m.
Court: Courtroom 6C
Judge: Hon. Stanley Blumenfeld, Jr.

Date Action Filed: March 31, 2023
Trial Date: Not Yet Set

NOTICE OF MOTION AND MOTION TO DISMISS

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

Please take notice that on August 11, 2023, at 8:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Stanley Blumenfeld, Jr. in Courtroom 6C, located at the First Street U.S. Courthouse, 350 West 1st Street, Los Angeles, California 90012, Defendant Community.com, Inc. (“Community”) will and hereby does move this Court for an order dismissing the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) without leave to amend on the grounds that:

- a) Plaintiff Cyndy Boulton lacks Article III standing; and
- b) Plaintiff Cyndy Boulton fails to state a claim upon which relief can be granted.

This Motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the pleadings and other records in the Court's file; and such other additional evidence and argument as may be presented to the Court.

This Motion is made following the conferences of counsel pursuant to L.R. 7-3, which took place on July 7, 2023, and July 10, 2023. I certify that the parties met in person or by videoconference, thoroughly discussed each and every issue raised in the motion, and attempted in good faith to resolve the motion in whole or in part.

Dated: July 14, 2023

MORRISON & FOERSTER LLP

By: /s/ Nancy R. Thomas
Nancy R. Thomas

*Attorneys for Defendant
Community.com, Inc.*

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1 **INTRODUCTION**

2 This is plaintiffs' counsel's second attempt to paint Community as an
 3 eavesdropper or wiretapper. In their first attempt, *Adler v. Community*, the Court
 4 dismissed plaintiffs' claims for violation of the federal Wiretap Act
 5 section 2511(1)(a) (ECPA) and California Invasion of Privacy Act (CIPA)
 6 section 631¹ with prejudice, leaving claims for violation of CIPA sections 632 and
 7 632.7. *Adler v. Community.com, Inc.*, No. 2:21-cv-02416-SB-JPR, 2021 WL
 8 4805435 (C.D. Cal. Aug. 2, 2021). Thereafter, in October 2021, plaintiffs
 9 dismissed all of their claims with prejudice. (*Adler*, ECF No. 42.)

10 Almost 18 months later, plaintiffs' counsel are back, filing a complaint on
 11 behalf of different plaintiffs, Michael McGinnis and Cyndy Boulton, alleging the
 12 same claims. Intervening law since the parties' briefing and the Court's ruling on
 13 the motion to dismiss in *Adler* has further undermined plaintiffs' claims. For
 14 example, the Supreme Court issued its ruling in *TransUnion LLC v. Ramirez*, 141
 15 S. Ct. 2190 (2021), holding a statutory violation alone does not create Article III
 16 standing. And since this Court issued its ruling in *Adler*, numerous courts have
 17 analyzed CIPA and ECPA claims like those asserted in this action and have
 18 dismissed those claims on a variety of grounds.

19 The parties agree that there is no reason to re-argue here the issues previously
 20 decided by the Court in the *Adler* motion to dismiss ruling. In fact, Boulton has
 21 agreed to dismiss her CIPA section 631 and ECPA claims without leave to amend.²

22 In this motion, Community moves to dismiss the remaining CIPA section
 23 632 and 632.7 claims on grounds not ruled on by the Court in *Adler*, including

24 ¹ All further statutory section references are to the California Penal Code.

25
 26 ² The parties have filed a stipulation to this effect with the Court, including
 27 both sides preserving the arguments they made in briefing the *Adler* motion to
 28 dismiss. (ECF No. 28.) If the stipulation is not granted by the Court, Community
 requests leave to supplement this motion to address the ECPA and CIPA section
 631 claims.

1 based on interpretations of CIPA in orders issued after the *Adler* briefing and an
 2 argument raised by the Court in the *Adler* Order that the Court declined to reach
 3 without additional briefing.

4 ***First***, Plaintiff Cyndy Boulton³ lacks Article III standing to bring her claim.
 5 She has alleged only a bare statutory violation without even identifying the content
 6 of her text to Community Leader LL Cool J’s Community number, much less any
 7 sensitive information included in that text. As the Court held recently in dismissing
 8 similar wiretap claims, this is plainly insufficient. *Byars v. Sterling Jewelers, Inc.*,
 9 No. 5:22-cv-01456-SB-SP, 2023 WL 2996686, at *2-4 (C.D. Cal. Apr. 5, 2023)
 10 (Blumenfeld, J.).

11 ***Second***, Boulton’s claim for violation of CIPA section 632 fails because, as
 12 the Court acknowledged in the *Adler* Order, courts have consistently found that
 13 electronic communications such as emails and chats are not “confidential” under
 14 the statute because unlike telephone conversations, they can be forwarded or
 15 shared. In addition, Community is not a “device” as required under section 632
 16 because it is a software application, not a type of equipment.

17 ***Third***, Boulton has not stated a claim for violation of CIPA section 632.7
 18 because she has not alleged that Community is a cellular or landline telephone as
 19 required under this section or that Community “intercepts” communications in
 20 transit.

21 Because no amendment can fix Boulton’s fundamentally flawed theories, the
 22 Court should dismiss this case without leave to amend. *See Lopez v. Smith*,

23
 24 ³ Plaintiff Michael McGinnis agreed to arbitrate any disputes with
 25 Community, and the parties have stipulated to stay his claims while plaintiffs’
 26 counsel continue their efforts to advise him that they will no longer represent him
 27 and to require McGinnis to appear if he intends to proceed. Although Community
 28 does not waive and instead expressly reserves its right to move to compel McGinnis
 to arbitrate his claims in accordance with the parties’ agreement, McGinnis’s claims
 are the same as Boulton’s claims, so the arguments in this Motion apply equally to
 his claims in any event.

1 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (A district court may deny
 2 otherwise-liberally-granted leave to amend if “it determines that the pleading could
 3 not possibly be cured by the allegation of other facts.” (citation omitted)).

4 **FACTUAL BACKGROUND**

5 **A. Community’s Messaging Platform.**

6 Community is an innovative platform that connects businesses, brands,
 7 political and public figures, creators, musicians, celebrities, and more (which
 8 Community refers to as “Community Leaders”) to their audiences at scale. (*See*
 9 *General FAQ: About Community*, <https://www.community.com/help> (last visited
 10 July 6, 2023).)⁴ Community Leaders sign up with Community and are assigned a
 11 Community number. Community Leaders then independently determine how and
 12 when to distribute that number to communicate with their followers. (*General*
 13 *FAQ: How does it work*, <https://community.com/help> (last visited July 6, 2023).)

14 Individuals who want to communicate with the Community Leader can send
 15 a text to the Community number identified by the Community Leader. (Compl.
 16 ¶¶ 45, 49.) Plaintiff alleges that after the Community number receives a text, on
 17 behalf of the Community Leader, Community sends the individual “two immediate
 18 automated texts back,” one of which provides a link to review and agree to
 19 Community’s Terms of Service and Privacy Policy. (*Id.* ¶¶ 18-21, 28; *see also*
 20 *General FAQ: How does it work*.) Individuals are required to “sign up for

21
 22 ⁴ The Complaint repeatedly references the Community.com website (E.g.,
 23 Compl. ¶ 1, 18, 20, 24, 43, 49, ECF No. 1), so the Court can take judicial notice of
 24 statements on its website in evaluating Community’s motion to dismiss. “[C]ourts
 25 must consider the complaint in its entirety,” including “documents incorporated
 26 into the complaint by reference.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551
 27 U.S. 308, 322 (2007). The incorporation-by-reference doctrine “prevents plaintiffs
 28 from selecting only portions of documents that support their claims, while omitting
 portions of those very documents that weaken — or doom — their claims.” *Khoja
 v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018); *see Knievel v.
 ESPN*, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (applying incorporation-by-
 reference doctrine to publicly available website pages); *Garcia v. Enter. Holdings,
 Inc.*, 78 F. Supp. 3d 1125, 1136-37 (N.D. Cal. 2015) (same).

1 [Community's social media] platform" and those who complete the sign-up process
 2 and agree to Community's Terms of Service can communicate with the Community
 3 Leader through the platform. (*Id.* ¶ 18.)

4 **B. The Adler Action.**

5 Most of the same plaintiffs' counsel representing Boulton in this action filed
 6 *Adler v. Community.com*, No. 2:21-cv-02416-SB-JPR (C.D. Cal), in March 2021.
 7 *Adler* began as a TCPA case. (*Adler*, ECF No. 1.) But the Supreme Court's ruling
 8 in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), precluded their claims and
 9 sent plaintiffs back to the drawing board. In an amended complaint, they
 10 repackaged their allegations to assert wiretap and surreptitious recording claims
 11 under ECPA and CIPA sections 631, 632, and 632.7.

12 Community moved to dismiss the complaint in its entirety. (*Adler*, ECF No.
 13 23.) The Court dismissed plaintiffs' ECPA and CIPA section 631 claims without
 14 leave to amend because plaintiffs did not allege Community "intercepted" the
 15 communications while they were in transit, and the deficiencies in the allegations
 16 could not be cured. *Adler*, 2021 WL 4805435, at *3-4. The Court allowed
 17 plaintiffs' section 632 and 632.7 claims to proceed, "declin[ing] to definitively
 18 resolve" at the pleading stage whether it was unreasonable for the *Adler* plaintiffs to
 19 expect that their texts to a celebrity they did not know were confidential. *Id.* at *5.

20 After initial discovery, plaintiffs subsequently voluntarily dismissed all of
 21 their claims with prejudice. (*Adler*, ECF No. 42.)

22 **C. Cyndy Boulton's Allegations and Agreement to Dismiss Her
 23 ECPA and CIPA section 631 Claims Without Leave to Amend.**

24 About 18 months later, plaintiffs' counsel filed this action. Boulton alleges
 25 she sent a text message to a Community number promoted by LL Cool J in a
 26 TikTok video he posted. (Compl. ¶¶ 45-46.) She alleges that she received two text
 27 messages in response, one with a link to Community's Terms of Service and
 28 Privacy Policy and another from the celebrity inviting her "to sign up for

1 Defendant's website." (*Id.* ¶ 49.) Boulton alleges that she did not complete the
 2 Community "sign up" process. (*Id.* ¶ 50.) She does not allege the content of her
 3 text to LL Cool J.

4 Boulton initially asserted the same ECPA and CIPA claims alleged in *Adler*.
 5 She has stipulated to dismiss her ECPA and CIPA section 631 claims without leave
 6 to amend. (ECF No. 28.)

7 Community is not relitigating here the Court's ruling on the motion to
 8 dismiss the remaining claims in *Adler*. Instead, as a threshold matter, Boulton lacks
 9 standing to pursue her claims pursuant to a Supreme Court decision, reversing the
 10 Ninth Circuit, issued after Community filed its motion to dismiss in *Adler*. In
 11 addition, Plaintiff's CIPA section 632 and 632.7 claims fail for reasons not ruled on
 12 by the Court in *Adler*, including based on CIPA rulings issued after this Court's
 13 *Adler* Order.

LEGAL STANDARD

15 A court must dismiss a complaint for lack of subject matter jurisdiction under
 16 Rule 12(b)(1) where the named plaintiff fails to satisfy Article III standing
 17 requirements. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122
 18 (9th Cir. 2010). Similarly, dismissal is required under Rule 12(b)(6) if plaintiff has
 19 not alleged sufficient facts establishing a claim to relief that is "plausible on its
 20 face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
 21 *Twombly*, 550 U.S. 544, 570 (2007)). "[L]abels and conclusions" or "a formulaic
 22 recitation of the elements" do not suffice. *Id.* (quoting *Twombly*, 550 U.S. at 555).

23 The Court must not assume the truth of legal conclusions merely because
 24 they are pleaded in the form of factual allegations; nor should it accept as true
 25 allegations contradicted by judicially noticeable facts. *Id.* at 677-79; *Twombly*, 550
 26 U.S. at 555; *Knievel*, 393 F.3d at 1076 (incorporation by reference doctrine
 27 "permits [the Court] to take into account documents 'whose contents are alleged in
 28 a complaint and whose authenticity no party questions, but which are not physically

1 attached to the plaintiff's pleading'" (citation omitted)).

2 ARGUMENT

3 I. Plaintiff's Bare Alleged Procedural Violations of CIPA Are Insufficient 4 to Confer Article III Standing.

5 " [L]ack of Article III standing requires dismissal for lack of subject matter
6 jurisdiction under [Rule] 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067
7 (9th Cir. 2011). "[T]o establish standing, a plaintiff must show [] that he suffered
8 an injury in fact that is concrete, particularized, and actual or imminent."

9 *TransUnion*, 141 S. Ct. at 2203. No such concrete harm exists here. Boulton
10 alleges nothing more than a bare statutory violation. (Compl. ¶¶ 113, 120, 127,
11 136.) She therefore does not have standing because, "under Article III, an injury in
12 law is not an injury in fact." *TransUnion*, 141 S. Ct. at 2205.

13 Nor does the alleged wiretapping and recording of Boulton's text to LL Cool
14 J bear a "close relationship" to traditional privacy harms at common law because
15 there is no allegation that the text was sensitive. *See id.* at 2204 (The standing
16 "inquiry asks whether plaintiffs have identified a close historical or common-law
17 analogue for their asserted injury."); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d 1016,
18 1041 (N.D. Cal. 2014) (explaining that, in the context of informational privacy,
19 only the "dissemination or misuse of *sensitive* and *confidential* information" is
20 protected (citation omitted)).

21 This Court recently dismissed CIPA claims due to plaintiff's failure to allege
22 injury-in-fact. *Sterling Jewelers*, 2023 WL 2996686, at *1. In *Sterling Jewelers*,
23 the Court held that "the position that any violation of CIPA necessarily constitutes
24 an injury in fact without the need for an additional showing of harm" is "at odds
25 with the Supreme Court's recent instruction" in *TransUnion*. *Id.* at *3. The Court
26 found it lacked subject matter jurisdiction and dismissed the complaint with
27 prejudice, because the complaint did not "identify any specific personal
28 information" in the messages at issue that could possibly "implicate[] . . . any harm

1 to [plaintiffs'] privacy." *Id.*

2 The same result applies here. Plaintiff alleges she sent an initial text to LL
 3 Cool J in response to his advertisement of his Community number in a Tik Tok
 4 video posted for his 2 million TikTok followers. (Compl. ¶¶ 45-46;
 5 www.tiktok.com/@llcoolj (last visited July 8, 2023) (indicating LL Cool J has
 6 2 million followers).) She does not allege the content of the text, much less allege
 7 that she sent a text to a celebrity she personally knows that contained sensitive
 8 information. She therefore lacks Article III standing to pursue her claims. *See,*
 9 *e.g., Sterling Jewelers*, 2023 WL 2996686, at *4 (dismissing CIPA claims because
 10 bare allegation of a statutory violation was not enough to "demonstrate an injury
 11 sufficient to confer [] Article III standing"); *Lightoller v. Jetblue Airways Corp.*,
 12 No. 23-cv-00361-H-KSC, 2023 WL 3963823, at *4 (S.D. Cal. June 12, 2023)
 13 (same).

14 **II. Plaintiff Fails to State a Claim Under CIPA.**

15 Boulton's attempt to analogize the Community platform to illegal
 16 wiretapping and recording fails on its face.

- 17 • To state a claim under CIPA section 632(a), Boulton must plead that
 Community used a "recording device to eavesdrop upon or record []
 confidential communication[s]." Cal. Pen. Code § 632(a).
- 18 • Under CIPA section 632.7(a), Boulton must adequately allege that
 Community "without the consent of all of the parties to a communication,
 intercepts or receives and intentionally records . . . a communication
 transmitted between two cellular radio telephones, a cellular radio
 telephone and a landline telephone, two cordless telephones, a cordless
 telephone and a landline telephone, or a cordless telephone and a cellular
 radio telephone." Cal. Pen. Code § 632.7(a).

27 Boulton does not allege the fundamental elements necessary to state a claim
 28 under sections 632 or 632.7.

1 **A. Plaintiff Fails to State a Claim under CIPA Section 632.**

2 In *Adler*, the Court rejected as premature Community’s argument that the
 3 initial texts plaintiffs sent to celebrities they did not know are not “confidential
 4 communications” under section 632, declining to rule on the issue at the pleadings
 5 stage. *Adler*, 2021 WL 4805432, at *5. The Court noted, though, that courts have
 6 held in a line of cases that by their nature, email and chat communications do not
 7 constitute “confidential communications” under the statute. *Id.* at *5 n.4. The
 8 Court declined to address the argument because it was not raised by the parties or
 9 adequately briefed. *Id.*

10 As the Court previewed two years ago, these cases establish that Boulton’s
 11 text was not a “confidential communication” under section 632. In addition, the
 12 claim fails because Community is a software application, not a “device” within the
 13 meaning of section 632.

14 **1. Text messages are not confidential communications.**

15 By its nature, Boulton’s text message is not confidential under section 632.
 16 For purposes of section 632, “a conversation is confidential if a party to that
 17 conversation has an objectively reasonable expectation that the conversation is not
 18 being overheard.” *Cline v. Reetz-Laiolo*, 329 F. Supp. 3d 1000, 1051 (N.D. Cal.
 19 2018) (quoting *Flanagan v. Flanagan*, 27 Cal. 4th 766, 768 (2002)). Said
 20 differently, section 632 applies only if the allegations “reasonably give rise to the
 21 expectation that *nobody . . .* would record the communications.” *Rodriguez v.*
 22 *Google LLC* (“*Rodriguez I*”), No. 20-cv-04688-RS, 2021 WL 2026726, at *7 (N.D.
 23 Cal. May 21, 2021) (citing *Flanagan*, 27 Cal. 4th at 777). There is no such
 24 reasonable expectation for text messages, particularly between strangers.

25 As the Court noted in *Adler*, courts have held repeatedly that electronic
 26 communications, such as emails and chats, are not confidential because, “unlike
 27 phone conversations, email services are by their very nature recorded on the
 28 computer of at least the recipient, who may then easily transmit the communication

1 to anyone else who has access to the internet or print the communications.” *Adler*,
 2 2021 WL 4805435, at *5 n.4 (quoting *In re Google Inc.*, No. 13-MD-02430-LHK,
 3 2013 WL 5423918, at *23 (N.D. Cal. Sept. 26, 2013)) (brackets omitted); *see also*,
 4 *e.g.*, *Campbell v. Facebook Inc.*, 77 F. Supp. 3d 836, 849 (N.D. Cal. 2014)
 5 (“Internet-based communications are not ‘confidential’ within the meaning of
 6 section 632, because such communications can easily be shared by, for instance, the
 7 recipient(s) of the communications.”); *In re Yahoo Mail Litig.*, 7 F. Supp. 3d at
 8 1041 (finding allegations that plaintiffs’ emails were “private” to be “fatally
 9 conclusory”). This is particularly so where the electronic communications are
 10 between strangers, such as in an internet chat room. *People v. Nakai*, 183 Cal. App.
 11 4th 499, 518-19 (2010) (finding conversations in internet chat rooms are not
 12 confidential where the “defendant was communicating online with a person whom
 13 he did not know”).

14 For this reason, “courts have developed a ***presumption*** that Internet
 15 communications do not reasonably give rise to that expectation” of privacy under
 16 section 632. *Revitch v. New Moosejaw, LLC*, No. 18-cv-06827-VC, 2019 WL
 17 5485330, at *3 (N.D. Cal. Oct. 23, 2019) (emphasis added) (citing and collecting
 18 cases); *see also Rodriguez I*, 2021 WL 2026726, at *7 (“[P]laintiffs must plead
 19 unique, definite circumstances rebutting California’s presumption against online
 20 confidentiality.”).

21 As the Court recognized, this rationale applies equally to text messages.
 22 *Adler*, 2021 WL 4805435, at *5 n.4 (noting the logic of *In re Google* and *Campbell*
 23 “would seemingly extend to text messages sent by phone as well”). A sender of a
 24 text message cannot reasonably assume no one would record it because that is how
 25 text messages work. *Rodriguez I*, 2021 WL 2026726, at *7. And like an email, a
 26 text message is recorded by the telecommunications carrier and others in the chain
 27 of communication and can be forwarded or distributed by the recipient. *Cf. Sunbelt*
 28 *Rentals, Inc. v. Victor*, 43 F. Supp. 3d 1026, 1035 n.3 (N.D. Cal. 2014) (explaining

1 in the context of the Fourth Amendment, “a plaintiff has no reasonable expectation
 2 of privacy in [text] messages sent to third parties”); *Fetsch v. City of Roseburg*, No.
 3 6:11-cv-6343-TC, 2012 WL 6742665, at *10 (D. Or. Dec. 31, 2012) (same,
 4 explaining sender of text voluntarily runs the risk that once delivered, his message
 5 would be viewed by anyone with access to the recipient’s phone). Accordingly,
 6 text messages are not “confidential communications” under section 632, so
 7 Boulton’s claim should be dismissed.

8 **2. Community’s software is not a “device.”**

9 Boulton’s section 632 claim also should be dismissed because she has not
 10 identified any “electronic amplifying or recording device” used to record the
 11 communications at issue. Cal. Penal Code § 632(a). A “device” is “a thing made
 12 or adapted for a particular purpose, especially a piece of mechanical or electronic
 13 equipment.” *Moreno v. S.F. Bay Area Rapid Transit Dist.*, No.17-cv-02911-JSC,
 14 2017 WL 6387764, at *5 (N.D. Cal. Dec. 14, 2017) (citation omitted); *see also*
 15 Merriam-Webster, “device,” <https://www.merriam-webster.com/dictionary/device>
 16 (last visited July 5, 2023) (defining “device” as “a piece of equipment or a
 17 mechanism designed to serve a special purpose or perform a special function,”
 18 providing examples of “smartphones and other electronic *devices*” and “a hidden
 19 recording *device*”).

20 For example, a video recorder can be a device—it is a piece of tangible
 21 equipment. *People v. Lyon*, 61 Cal. App. 5th 237, 245 (2021). But “[s]oftware like
 22 Google Maps, Chrome, etc. are not ‘devices’ within the meaning of CIPA because
 23 they are not ‘equipment.’” *In re Google Location Hist. Litig.*, 428 F. Supp. 3d 185,
 24 193 (N.D. Cal. 2019) (citation omitted) (interpreting and applying ordinary
 25 meaning of “device” in analogous CIPA section 637.7 claim).

26 Here, Boulton acknowledges that Community’s platform is a software
 27 application, not a tangible piece of equipment. (Compl. ¶¶ 25, 90.) Her repeated
 28 conclusory use of the term “device” in the Complaint, unsupported by any specific

1 factual allegations, cannot change this result. (*Id.* ¶¶ 73, 89, 135); *cf. Rodriguez v.*

2 Google LLC (“*Rodriguez II*”), No. 20-cv-04688-RS, 2022 WL 214552, at *1-2

3 (N.D. Cal. Jan. 25, 2022) (dismissing CIPA section 631 claim, noting plaintiffs’

4 “[u]sing the word ‘intercept’ repeatedly is simply not enough without the addition

5 of specific facts that make it plausible Google is intercepting their data in transit”).

6 **B. Plaintiff Fails to State a Claim under CIPA Section 632.7.**

7 Boulton does not plead an essential element of her section 632.7 claim and it

8 is overbroad in any event. Section 632.7 imposes liability on any person who

9 “without the consent of all of the parties to a communication, intercepts or receives

10 and intentionally records . . . a communication transmitted between [1] two cellular

11 radio telephones[.]” Cal. Penal Code § 632.7. Here, Boulton has not alleged that

12 that telephones were used on *both* sides of the communication and she cannot base

13 her claim on interception.

14 **1. Boulton has not alleged the requisite use of two telephones.**

15 Section 632.7’s plain language “unambiguously limits its reach to

16 communications *between* various types of telephones.” *Valenzuela v. Keurig Green*

17 *Mountain, Inc.*, No. 22-cv-09042-JSC, 2023 WL 3707181, at *6 (N.D. Cal. May

18 24, 2023); *accord Byars v. Hot Topic Inc.*, No. EDCV 22-1652 JGB (KKx), 2023

19 WL 2026994, at *10 (C.D. Cal. Feb. 14, 2023) (“The unambiguous meaning of the

20 statute is thus that it only applies to communications involving two telephones.”);

21 *Licea v. Cinmar, LLC*, -- F. Supp. 3d at --, 2023 WL 2415592, at *12 (C.D. Cal.

22 Mar. 7, 2023) (same).

23 Boulton admits that Community’s platform is a software application, not a

24 telephone. (Compl. ¶¶ 73, 89-90, 118.) That Community Leaders allegedly

25 advertised that their Community number was a cell phone number or that Boulton

26 thought she was sending the text to a cell phone is not relevant. (*Id.* ¶¶ 45-46.) In

27 fact, Boulton alleges repeatedly that the Community number was not “LL Cool J’s

28 phone number[],” and that Community “refused to deliver the messages to [him].”

1 (*Id.* ¶¶ 52-53; *see also id.* ¶ 67 (alleging that “messages sent to Defendant’s
2 celebrity clients are instead rerouted to and captured by Defendant and never
3 actually reach the celebrity”)). Section 632.7 applies only to communications sent
4 and received by actual telephones.

5 Boulton's allegations that the text at issue was received by Community's
6 platform and that Community's platform is not a cellular telephone defeat her
7 claim.

2. Boulton has not alleged interception.

Even if that were not the case, the Court’s dismissal of the section 631 and ECPA claims in *Adler* for failure to allege Community “intercepts” messages defeats any section 632.7 claim based on interception of communications. The Ninth Circuit’s narrow construction of the term “intercept” under section 631 applies equally to the meaning of the same term in section 632.7. *See Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (2002) (explaining “intercept” means the communication “must be acquired during transmission, not while it is in electronic storage”). Accordingly, Boulton cannot base her section 632.7 claim on alleged interception of her text to LL Cool J’s Community number.

CONCLUSION

19 For the foregoing reasons, the Court should dismiss the Complaint with
20 prejudice.

21 | Dated: July 14, 2023

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